IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.670 OF 2005
CONNECTED WITH
COMPANY APPLICATION NIO.411 OF 2005

Tech Pacific (India) Ltd. Petitioner

versus

Samsung India Electronics
Pvt. Ltd. Intervenor

Mr.F.T.Devitre with Mr.Harinder Toor and S.Balakrishunan and Sheik Khan for petitioners i/by M/s.Crawford Bayley & Co. for petitioner.

Mr.D.J.Khambatta with Mr.Hemant Sethi for Intervenor/Objectionist.

Mr.C.J.Joy with Mr.R.C.Master & M.M.Goswami-Panel counsel i/by Dr.J.C.Kaushik for R.D.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 10th March 2006

PC :

1. This is a petition under section 391 to 394 of the Companies Act, 1956 by the Transferee company. It seeks sanction to the scheme of amalgamation with one Ingra Micro India Pvt. Ltd. (hereinafter referred to as the Transferer company).

2. It has been pointed out in para 2 of this petition that the petitioner company was incorporated on 5th March 1996 originally at Bangalore in Karnataka State. It was then named as Tech Pacific (I) Ltd.. The name is changed as that of the petitioner w.e.f. 1st May 2000. Thus, it is a public limited company. On and from 27th June 2002 the registered office was shifted from State of Karnataka to State of Maharashtra and now it situate at the address mentioned in the cause title.

3. The objects of the company are set out in paragraph 3 of the petition. The details pertaining to the authorised, issued, subscribed paid-up share capital of the petitioner company are set out in para 4 and with regard to its financial position, particulars with figures are set out in para 6 of the petition.

4. As far as transferor company is concerned, it’s details are set out in para no.7. It’s objects are set out in para no.8 and particulars with regard to it’s share capital and financial position are set out in paras 9 to 11.

5. The benefits of the scheme of amalgamation

are set out in para no.13 and the petitioners submit that the salient features include taking over by the petitioner the transferor as a going concern and its vesting with all its assets, properties, rights as well as obligations and liabilities. These features being set out in the petition, ultimately, it is contended that no prejudice would be caused to any creditor of the company as a result of sanction to the scheme. The latest Audited Accounts would indicate that the petitioner is a solvent company and would be able to meet the liabilities present and in future. It is pointed out that the amalgamation will not cause any additional burden on the share holders of the either companies nor will it affect the interest of any class of share holders or creditors. Consideration for the proposed scheme of amalgamation is set out in details in paragraph no.16 and ultimately it is contended that prior to this company petition, in Company Application No.411 of 2005 preferred by the petitioner company, this Court dispensed with the meeting of the equity share holders, as they had given their consent to the scheme, in writing. As far as secured creditors are concerned, it is pointed out that three secured creditors, names of whom are listed in para 17 of this petition,

have, in writing, consented to the scheme and have no objection to the same being sanctioned by this Court.

6. It is in these circumstances, that the petitioner company seeks approval and sanction to the scheme.

7. Shri Devitre - learned senior counsel appearing for the petitioner submits that all silent features of the scheme have been set out in the petition. The requisite details with regard to financial position as per statutory requirement, have also been set out. He submits that as far as directions of this Court are concerned, they also are complied with and an affidavit has been filed to that effect in this Court. After inviting my attention to the Audited Balance Sheet as of 31st December 2004, it is contended by Shri Devitre that the unaudited accounts are also placed before this Court and in that behalf he invites my attention to page 189-A and 189-B of this petition. In the submission of Shri Devitre, the provisions of Section 391 (sub sections 1 and 2 read with proviso thereto), have been complied with. He places strong reliance upon a decision of this

Court reported in 2001-Vol.104-Company Cases-371 (In re : Blue Star Ltd.).

8. Shri Devitre submits that no creditor, secured or unsecured, has come forward to object the scheme. He submits that the petition and all details were duly forwarded to the statutory authorities and an affidavit of the Regional Director filed in this petition, in terms states that no prejudice will be caused if this Court were to sanction the scheme and all that is contended in the said affidavit is that upon scheme being sanctioned the name of company will under-go a change, and, therefore, it will have to comply with the mandate of Sections 21 to 23 of Companies Act, 1956.

9. Shri Devitre makes a statement that compliance with these provisions would be made by the company, if this Court sanctions the scheme, as prayed.

10. There is an objection raised to the scheme by one of the unsecured creditor and that intervention/objection is placed on record by way of affidavit of the Vice President (Finance) of the intervenor-company. Shri Khambatta - learned

senior counsel appearing for the said intervener urges that the scheme should not be sanctioned as it would be prejudicial to the interest of creditors because the latest financial position of the company is not placed before this Court. He invites my attention to an averment in the affidavit filed in rejoinder on behalf of petitioner to the effect that the petitioner is in a position to place unaudited balance sheet and summary for the year ending on 31st December 2005 if the same is required. Shri Khambatta states that a copy of this affidavit in rejoinder being served on the intervener two days before the date of hearing of this petition, the intervener proceedcs on the basis of denials. As far as this statement is concerned, it clearly reflects that there is no compliance with the mandate of Section 391(2) and proviso thereto. He submits that the intervener has a pending claim of Rs.32.00 crores and proceedings in that behalf are pending in this Court. He submits that claim is against the petitioner and all details pertaining thereto are placed before this Court in those proceedings. He invites my attention to a communication dated 10th May 2005 which is annexed to the affidavit in rejoinder of the petitioner and submits that once there is an

admission of the liability to the extent indicated therein, then the statements in affidavit filed on 7th March 2006 cannot be believed and in any event if they have to be believed, some proof is necessary to support them. The said proof can only be figures in the so called unaudited balance sheet and accounts till 31st December 2005 and they must be directed to be produced before any orders are passed on this company application.

11. Shri Khambatta relied upon a judgement of this Court (Coram : Dr.S.Radhakrishnan, J.) reported in (2000)1-Company Law Journal-351 (KEC International Ltd. Vs. Kamani Employees Union and others). He submits that this Court has taken a view in this decision that the proviso to Section 391(2) makes it abundantly clear that no order of sanctioning of any arrangement can be made unless the Court is satisfied with the latest financial position and the word "latest financial position" would mean the position as prevailing at the time of hearing of the application i.e. at the time of sanctioning. In his submission, in the light of the law laid down in the aforesaid judgement of this Court, the company petition deserves to be dismissed.

12. With the assistance of Shri Devitre and Shri Khambatta I have perused the petition, annexures thereto as also the affidavits filed by the Regional Director, the intervener and the petitioner herein. I have perused the relevant statutory provisions as also the decisions relied upon. In my view, the intervener cannot object to the scheme by relying upon a pending claim which is yet to be adjudicated. As is rightly pointed out by Shri Devitre, the petitioner has taken over all liabilities and obligations under the scheme of amalgamation and it is opposing the said claims on merits. The version on merits of the claim is placed on record in proceedings initiated by the intervener herein. In my view, merely because a petition for winding up against petitioner is filed in this Court, that does not prevent this Court from considering the scheme. In fact, no prohibition of this nature has been brought to my notice, in Companies Act, by Shri Khambatta. In his submission, this Court can sanction the scheme only if there is compliance to the mandate of Section 391(2) proviso thereto.

13. The said provision in terms states that power to compromise or make arrangements with the

creditors and members proposed between the company and its creditors or any class of them or between a company and its members or any class of them, can be sanctioned only if this Court is satisfied that the company or any other person by whom the application is made for seeking such sanction, has disclosed to this Court by affidavit or otherwise, all material facts relating to the company such as latest financial position of the company, latest auditor's report and accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251 of the Companies Act and the like.

14. In the present case, all that is being urged is irrespective of filing of the latest audited balance sheet up to 31st December 2004, the latest financial position of the company is not placed before this Court at the time of hearing of the petition. A dispute is raised with regard to the figures presented at pages 189-A and 189-B only with regard to the claim of intervenor. The submission of Shri Khambatta is that because there is dispensation of a meeting of unsecured creditors, it is the obligation of the petitioner to disclose even the unaudited balance sheet and

amounts as of 31st December 2005.

15. In the facts of this case, it is not disputed that the latest auditor'r report is filed along with the petition which is presented on 23rd September 2005. The petitioner has reached final hearing in March 2006. The submission of Shri Devitre is that the accounts for the year ending on 31st December 2005 are not audited and the audit process is going on. However, unaudited balance sheet and accounts as on 30th June 2005 are placed before this Court to show that the company is financially sound.

16. In my view, Shri Devitre is right in contending that the petitioner has complied with the proviso to Section 391(2) by disclosing to this Court all material facts relating to the company including the latest Auditor's Report and also the financial position. The position as far as accounts is concerned, namely that they are unaudited for the current accounting year, is not disputed by the intervenor. The petitioner has pointed out that as far as its assets and liabilities are concerned, the position is placed before this Court. I have before me the financial position of company as on 31st December

2004 which is reflected from Annexure-C namely Annual Report for the year ending 31st December 2004. Similarly, unaudited balance sheet as on 30th June 2005 signed by the Director of the petitioner showing the total Assets and total Liabilities as well as Profit and Loss Account is placed before this Court. Thus, it cannot be said that the latest financial position is not placed before this Court.

17. The objection of the intervenor, therefore, cannot be accepted. Once such view is taken in the facts and circumstances of this case, then it is not necessary to go into the rival contentions with regard to the precise meaning of expression "latest financial position" as appearing in Section 391(2) proviso. It is also not necessary to consider as to whether the view taken by this Court (Coram : Dr.S.Radhakrishnan, J.) and learned Single Judge (Coram : Nijjar, J.) subsequent thereto, shows a conflicting interpretation. These contentions can be considered in an appropriate case and are left open for the time being.

18. In my view, an individual intervenor whose claim is admittedly pending adjudication, cannot

be heard to say that the scheme is prejudicial to the general interest of creditors and share holders of the company. In these circumstances, leaving all contentions of the intervenor as well as petitioner open insofar as said claim present petition is allowed. Hence following order :-

19. ORDER : Petition is made absolute in terms of prayer clauses (a) to (h). Filing and issuance of Drawn up of order is dispensed with. All concerned to act on copy of order and the scheme annexed to the petition duly authenticated by the Company Registrar.

(S.C.DHARMADHIKARI, J.)